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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

LEON S. DAY, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

(1) Whether unjustified delays in obtaining Social Security Disability Insurance reconsideration decisions and face-to-face hearings violated respondents' rights under the Social Security Act to have an opportunity for a hearing within a reasonable time.

(2) Whether the district court abused its discretion in ordering that respondents' right to reasonably prompt action be protected by requiring adherence in Vermont to carefully crafted objective time standards with specified exeptions to measure the reasonableness of the delays.

(3) Whether the district court abused its equitable powers to enforce its order by requiring prospective monthly payments to respondents whose rights under the Act and order were violated, beginning at the earliest with the month after the order was violated, and ending with the month the delayed reconsideration decision or hearing was provided.

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

When claimants appeal adverse initial determinations that they are not entitled to Social Security disability insurance benefits, they face a complex three-step process followed by federal court review. The named plaintiff and intervenor in this case, both of whom ultimately succeeded on their claim that their benefits had been terminated in error, brought this case to challenge the unwarranted delays they encountered in the first two steps of that process.

The Disability Insurance Benefits (DIB) program was created in 1956 under Title II of the Social Security Act, as amended, 70 Stat. 815, 42 U.S.C. §423(a), to provide monthly benefits to workers whose employment history qualifies them as "insured" and who are currently unable to engage in any substantial gainful activity because of their disability. 42 U.S.C. §423(c)(1), (d)(1)(A). The program is administered by the Secretary of the United States Department of Health and Human Services (HHS) through the Social Security Administration (SSA). In Vermont, the Social Security Administration has contracted with the Vermont Disability Determination Agency (DDA) to make determinations of disability with respect to Vermont claimants. *See* 42 U.S.C. §421.

Section 205(b) of the Social Security Act, 42 U.S.C. §405(b), requires the Secretary "to make findings of fact, and decisions as to the rights of any individual applying" for benefits. When an application is denied, or when upon subsequent review the Secretary determines that a current beneficiary has ceased to be disabled, §205(b) states that the Secretary shall provide the claimant with "reasonable notice and opportunity for a hearing." Finally, the Act provides claimants with the right to seek judicial review in federal court after a final decision of the Secretary made after hearing. 42 U.S.C. §405(g).

In implementing the Act, however, the Secretary has chosen to establish a mandatory three stage appellate

review procedure as a precondition to seeking judicial review:[1]

"Reconsideration"—a paper review by the DDA of its initial determination, 20 C.F.R. §404.904;

A hearing before an Administrative Law Judge, 20 C.F.R. §404.929; and

A paper review before the Appeals Council, 20 C.F.R. §404.967.

Significantly, no time frames are built into the regulations governing any of these three stages of review despite the fact that claimants may be without benefits during this period and are barred from seeking further review until each stage is completed. *See* Brief for the Petitioner (hereafter, Br.) at 3-6; 20 C.F.R. §404.900(a)(5).

While the Secretary's Statement provides a general overview of the SSA appeals process and evolving statistics, it makes little mention of the factual record considered by the courts below.[2] Yet in enjoining unreasonable delays at the first two phases of the administrative appeals process, the district court considered detailed data concerning the inner workings of the review process in operation in the State of Vermont. Indeed, this factual development was crucial to the outcome of the case below.

Named plaintiff Leon S. Day had been determined disabled in 1975 because of a stroke. J.A. 26. In November 1977 the Secretary determined—erroneously, as she ultimately conceded nearly three years later (J.A. 150)—that his disability had ceased. Accordingly, the benefits which had been the primary source of support for Mr. and Mrs. Day and their three children were terminated.

Mr. Day requested reconsideration of the determination that he was no longer disabled. The DDA took 167

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[1]Respondents are not suggesting any violation of §205(b) in the creation of this complex procedure.

[2]The circumstances of named plaintiffs Day and Maurais, *e.g.*, are relegated to one note. Br. at 10-11, n. 15. Even there the information supplied is not complete, for Mr. Day like Mr. Maurais ultimately prevailed on his appeal. Joint Appendix (hereafter, J.A.) 150.

days to review its determination and respond—negatively—to Mr. Day's appeal. Mr. Day then immediately requested a hearing from SSA. However, notwithstanding the passage of some five months, no hearing was ever scheduled. It was only after this action as filed in the district court that an administrative hearing was scheduled and held in December 1978, almost a year after the initial request for review of the adverse determination.

During this period, Mr. Day went deeply into debt. At the time this action was filed in November 1978, Mr. Day had $27 in cash and owed $1,181.93 for fuel and $133 for medical expenses. His only asset of any significance was a 1964 Chevrolet valued at $50. J.A. 18. The family was forced to give up its living quarters and move. J.A. 21.

Intervenor Amedie Maurais, who was also ultimately successful in his appeal, faced similar delays and hardships. From the date when he filed his request for reconsideration until a hearing was scheduled, 280 days passed. During this time he went into substantial debt to maintain his home, had difficulty affording needed prescription drugs, and was unable to repair his 10 year old pick-up truck. J.A. 34.

In the proceedings before the district court, the delays encountered in the named plaintiffs' cases, as well as those of other claimants in Vermont, were explored in considerable detail. Three conclusions emerge from an examination of this record:

1. Nothing done by the named plaintiff or intervenor, nor indeed by the claimants in almost any of the other Vermont cases reviewed, were the cause of the severe delays encountered.

2. In all of the cases reviewed which took longer periods of time to process, and in many of the others, there were, as the district court found, "lengthy unexplained delays." Petition Appendix (hereinafter, Pet. App.) E at 25a.

3. To the extent explanations for delays were provided, they frequently showed that processing "mistakes" had been made or that the program was being maladministered.

With regard to reconsideration, Mr. Day's case demonstrates two different, non-claimant caused types of delays. First, the simple act of initiating arrangements to forward relevant portions of the claims folder to the DDA, typically accomplished within a few days, took 34 days. *Compare* J.A. 55-56 with J.A. 105-149. Once the folder was received, the reconsideration determination took one day. Next, 38 more days passed before Mr. Day's case was selected for a "Quality Assurance Review" procedure that is utilized in a selected sample of cases. J.A. 56. Four months were then consumed by this process, during which Mr. Day had neither benefits nor an opportunity to appeal to a higher level.

There have never been a large number of reconsideration cases before the Vermont DDA. Between October 1, 1977 and January 31, 1980, the Vermont DDA received 421 requests for reconsideration of initial denials and 32 requests for reconsideration of terminations of benefits. J.A. 91, 93. At this time agency officials explicitly recognized the need to implement procedures to shorten processing times in "aged cases", i.e., those incomplete after 70 days. J.A. 167. The average processing time for the 421 reconsiderations of initial applications was 54.9 days, but many of the cases took well over 100 days. J.A. 91 and Att. A (in record). Of the 31 termination cases on which information was available, only nine were decided in less than 90 days. J.A. 94.

In response to respondents' discovery requests, the Secetary supplied summaries of 77 randomly selected cases (J.A. 105-149) which she said were "representative of the reconsideration process." Pet. App. E at 26a, n.6. While 12 of the summarized cases were processed in 30 days or less, more than one-third were incomplete after 90 days, and a large number took over 120 days. Pet. App. E at 25a. The district court concluded that in every reconsideration that ". . . took longer than 90 days there are periods of unexplained delay, not directly attributable to necessary steps in the reconsideration process." Pet. App. E at 28a.

While delay in sample cases, as well as in the named plaintiffs' cases, may have been "unexplained," indications of likely underlying causes are found in the record.

These sample cases clearly illustrate the possible causes of reconsideration delay and the near universal link to agency error. J.A. 105-149.

In the first place, the summaries established several reasons that are not the cause of delay. In not one case was the delay caused because a face-to-face interview was held or because a claimant requested additional medical examinations. Further, in only one of the 77 cases did a claimant or representative request a delay. J.A. 107, 125-26.

Rather, virtually every case summary with a lengthy processing time involved one or more of the following characteristics:

1. DDA failure to follow-up promptly upon its requests for medical information which were still unanswered.
2. DDA failure to act with dispatch after receipt of new medical evidence or in scheduling consultative examinations.
3. Internal DDA failure to review evidence or generate notices promptly.
4. Breakdown in communication between DDA and SSA offices.

In addition, many of the 77 sample summaries provide examples of multiple, independent causes of agency delay in single cases.[3]

Further explanation for delay is found in the testimony of agency officials. The Administrator of the Vermont DDA stated, for example, that during the applicable time period examiners had carried widely disproportionate caseloads. Administrative changes had to be made so that time could be scheduled more effectively.[4] SSA

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[3]The case summary data, J.A. 105-149, was analyzed in detail by respondents for the district court. *See* Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (Mar. 4, 1981) at 5-11 and Appendix 2.

[4]J.A. 162. The Secretary had previously reported that the annual budget of the Vermont DDA increased from $354,024 in 1975 to $750,000 in 1980, while both the initial and the reconsideration case loads remained relatively constant. J.A. 43, 61, 155-56.

regional officials visiting the Vermont DDA observed that "the main reason for the high percentage of aged [*i.e.*., delayed] cases in Vermont is lack of timely follow-ups and basic inadherence to sound development practices." J.A. 168. On a later visit, it was observed that "the single largest contributing factor is low examiner productivity . . . [which] manifests itself in the mean processing time for both Titles II and XVI." J.A. 177.

The unreasonable delays encountered in the reconsideration process are, for all too many of those whose denials are affirmed and who seek further review, only the prelude to delay pending the scheduling of a hearing before the Administrative Law Judge. Once again Mr. Day's case is illustrative. An adverse reconsideration determination was issued by SSA on June 6, 1978 and a letter requesting a hearing was received by SSA on June 16. Under the normal procedure, such a request is *immediately* forwarded to the SSA hearing office in Manchester, New Hampshire. At that point the case is assigned to an ALJ on a rotating basis, based on the order in which it is received. The claim folder is also located and sent to the hearing office where case controls are established, additional medical development is undertaken, and a hearing scheduled. J.A. 47, 48, 50.

In Mr. Day's case, however, the Social Security District Office improperly held the file for over two months due to an employee's mistaken belief that a simple form being sought for the record was a precondition for further action when it plainly was not. J.A. 47-48, 57. As a result, there was a delay of two and a half months in assigning an ALJ to the case. This meant that the file could not be reviewed for further developments and a hearing could not be scheduled. Then, when the hearing office received the file, it took no further steps until this suit was filed on November 15, 1978. J.A. 57. On November 20, a notice was mailed to Mr. Day scheduling a hearing on December 4, some 340 days after he initiated his appeal.

Delays at the hearing level are of critical importance since the vast majority of Vermont claimants who are unsuccessful at the reconsideration level request a hearing, J.A. 61-62, at which the majority are found to be

eligible for benefits. At the time this case was heard below, more than 56 percent of them were successful at hearing level.[5] Moreover, the record shows that the Secretary had in January 1978 established 90 days as the standard for scheduling all hearings in Vermont, J.A. 50, 52, and that the Secretary had concluded that she had the full complement of ALJ's which she needed to process the Vermont caseload.[6] The only explanations in the record as to why this 90 day standard could not be met are scheduling problems when "distant travel" is required and the need to obtain medical evidence.J.A. 52. Nonetheless, a review of 194 individual Vermont case summaries submitted to the district court showed that there was an unexplained failure to meet the 90 day standard in just over half the cases. J.A. 50, 47, 63-67.

Finding that hearing delays in Vermont violated §205(b) of the Act, Pet. App. D, and some two years later finding that reconsideration delays did as well, Pet. App.

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[5]J.A. 53. While more recent figures on reversal rates in Vermont are not available, published data indicates that they are likely to have increased. For example, in Region I (the New England region which includes Vermont), the reversal rate at the hearing level for Title II disability cases was 55.1% in 1976-1978. J.A. 53. In May 1983, over 63% of those claimants who received a decision after a hearing were successful. Department of HHS, SSA, Office of Hearings and Appeals, *Key Workload Indicators*, May 1983, 3 (June 29, 1983) (the Secretary lodged a copy of this publication with the Clerk of this Court, *see* Br. at 3). Many other claimants are ultimately found eligible for benefits before the Appeals Council or federal courts. *See id.* at 9, 14.

[6]J.A. 48. The Secretary has authority to transfer ALJs into Vermont if necessary, J.A. 51, but has apparently not found it necessary to do so in order to achieve virtually total compliance with the 90 day time limit ordered in *Barnett v. Califano*, 580 F.2d 28 (2d Cir. 1978), an earlier Vermont case involving hearings before the same ALJs in SSI cases, or the 90 day order in this case. *See* Appendix to this brief, attached to show the Secretary's ability to comply with the district court's order, para. 2 (hereafter App.). Since compliance has been achieved with existing resources, resources do not appear to have been the problem.

E, the district judge enforced the claimants' statutory rights by imposing deadlines to complete reconsiderations and to schedule hearings that were well within the Secretary's capabilities. Most significantly, the court excepted from its time limitations all those cases wherein delay is "... caused at the claimant's instance or where the delay is assignable to the claimant's contention that changed circumstances mandate reconsideration of additional evidence." Pet. App. E at 30a. In addition, the court exempted from its time limitations on reconsiderations all time needed for consultative medical examinations requested by the agency. Moreover, unlimited time further was allowed for post-hearing development and preparation of the decision by the ALJ. The district court drafted these exceptions in careful detail, Pet. App. F at 33a - 34a, which convinced the court of appeals that "... the relief ordered was crafted with an eye toward the Secretary's concerns," including the need "... to assure accurate results." Pet. App. A at 8a.

Finally, to insure SSA compliance with its order (and not incidentally, to prevent irreparable injury to wronged claimants), the district court drew upon its equitable powers to provide for a recoupable, prospective interim payment device in favor of claimants who continued to suffer illegal unreasonable delay. Significantly, while this enforcement mechanism can be triggered only by future violations of the order by the Secretary, it likewise terminates when any action by the claimant serves to prolong the delay. Pet. App. F, paragraphs 6 and 7. Indeed, although the outer-bound of a routine reconsideration processing was found to be 90 days, the trial court disallowed interim relief until the passage of 180 days, being ". . . persuaded that this solution most appropriately balances the administrative difficulties in implementing this order and the financial needs of deserving claimants." Pet. App. E at 31a.

The relief granted by the district court became effective in Vermont on December 30, 1980, with respect to hearings, and on December 29, 1981, with respect to reconsiderations. Pet. App. F, paragraphs 3, 5 and 9. No stay was

sought by the Secretary pending any subsequent appellate developments. The Second Circuit affirmed the district court judgment in all respects on June 28, 1982. Pet. App. A.

SUMMARY OF ARGUMENT

I

The Secretary does not dispute that Congress, in designing a program to provide insurance benefits to disabled workers and their families, intended that aggrieved claimants have the right to have their claims heard by the agency within a reasonable time. This conclusion is supported by the language of the statute guaranteeing claimants a right to a hearing, §205(b) of the Social Security Act, 42 U.S.C. §405(b), the legislative intent of the Social Security Act, and the agency's contemporaneous construction of the Act. It also follows logically that the statutory right to prompt hearings cannot be frustrated by the Secretary's imposition of additional procedures which a claimant must exhaust before he can become entitled to a hearing.

In determining whether the delays faced by respondents were indeed unreasonable, the district court analyzed the factual record which was some three years in the making. That record showed lengthy delays which were often unexplained and were not required to ensure that each case was adequately developed and accurately considered. Based on this record, the district court concluded that the delays both at the reconsideration and hearing level were unreasonable, violating respondents' rights under the Social Security Act.

That the district court was correct in concluding the delays were unreasonable can perhaps best be seen by comparing the delays and attendant harms faced by respondents herein with the situation which this Court reviewed in *Fusari v. Steinberg*, 419 U.S. 379 (1975), concerning Title III of the Social Security Act. In that case, the Court looked at all the facts in the case to determine that the timeliness requirement in the unemployment

compensation program was violated. When the factual situation in *Fusari* is compared to the factual situation presented herein, it is evident that the district court was correct in finding the delays unreasonable. In every regard—length of delays, amount of benefits at stake, the likelihood of the claimant prevailing at the hearing, and the justification or lack thereof for the delays—the delays present in the instant case are more unreasonable than the delays found unacceptable in *Fusari*.

II

The remedy devised by the district court—imposition of objective time limits which exclude time necessry for the proper development of cases—took into account the valid needs of the Secretary and at the same time served to remedy the violation of respondent's rights. The time limits incorporated the Secretary's own standards and provided the court an objective standard to determine if respondent's rights were being violated. The use of time limits is hardly unreasonable given the Secretary's past and present statements regarding their usefulness to ensure the expeditious processing of cases and the Secretary's failure to offer the court any alternative remedy. Moreover, the use of time limits as a remedy for violation of the Social Security Act does not conflict with any provision of the Act and is consonant with the purposes of that Act. Finally, the remedy is in no way inconsistent with continuing congressional oversight activities.

III

Finally, that part of the district court's order which requires the Secretary to make interim payments when a claimant's rights to reconsideration decisions and the holding of a hearing within a reasonable time are violated is an effective and fair way to ensure that the Act and the court's order are obeyed. No payments are made if the Secretary complies with the Act and the court's order. No statute or case law bars the court from utilizing such an enforcement mechanism.

ARGUMENT

I. THE COURTS BELOW CORRECTLY DECIDED THAT, ON THE RECORD BEFORE THEM, RESPONDENTS' RIGHTS TO DECISIONS ON THEIR CLAIMS FOR SOCIAL SECURITY DISABILITY INSURANCE BENEFITS WERE VIOLATED BY UNREASONABLE DELAYS.

A. The Social Security Act Requires That All Appeals Be Decided Within A Reasonable Time.

Section 205(b) of the Social Security Act provides that the Secretary shall provide aggrieved individuals seeking benefits "reasonable notice and opportunity for a hearing." The courts below concluded that a "reasonable ... opportunity for a hearing" meant, *inter alia*, a hearing provided within a reasonable time. The Secretary does not address this reading of the statute, however, but appears to concede this point by focusing instead upon the measure of reasonableness.[7]

A review of the history of §205(b) and the federal agency's application of that provision to its administration of the program confirms the common-sense correctness of the reading of the statute by the courts. The requirement that aggrieved individuals receive "reasonable ... opportunity for a hearing" has remained intact since §205(b) was added to the Social Security Act of 1935 by the 1939 amendments. Act of August 10, 1939, ch. 666, §201, 53 Stat. 1362. Although Congress has since amended §205(b) in various respects on at least six different occasions[8] the language of the section has not been changed. Therefore, to determine the right afforded by the statute,

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[7]Nor apparently did the Secretary dispute this construction when the issue was first decided in the Second Circuit, *White v. Mathews*, 559 F.2d 852, 858 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

[8]Act of Aug. 28, 1950, ch. 809, §108(a), 64 Stat. 518; Act of Aug. 1, 1956, ch. 836, §111(a), 70 Stat. 831; Act of July 30, 1965, Pub. L. No. 89-97, §308(d)(9), 79 Stat. 379; Act of Jan. 2, 1976, Pub. L. No. 94-202, §4, 89 Stat. 1136; Act of June 9, 1980, Pub. L. No. 96-265, §305(a), 94 Stat. 457; Act of Jan. 12, 1983, Pub. L. No. 97-455, §4, 96 Stat. 2499.

the crucial issue is the intent of the Congress that enacted it. *See New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 527 (1979) (plurality opinion).

Congress did not specifically explain its purpose in enacting §205(b); the congressional reports merely paraphrased the statutory language. *See* H. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939). However, the overall purpose of the 1939 amendments was "to strengthen and extend the principles and objectives of the Social Security Act." H. Rep. No. 728, *supra* at 5. Those objectives were broadly remedial: to "relieve the existing distress and . . . to reduce destitution and dependency in the future," H. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935), and to provide a "more comprehensive attack on insecurity."[9]

The early administrators recognized that the expeditious processing of claims was a necessary precondition to meeting the goals of the 1935 Act. They put into operation a system which handled numerous claims with great speed, even though they lacked the automated systems available today to handle large numbers of claims. An early appraisal of the adjudication system established by the Bureau of Old Age and Survivors Insurance of the Social Security Board for processing both initial claims and reconsiderations stated:

> A large volume of cases has been handled with efficiency and dispatch. The average time which elapses from receipt of the file by the Bureau until a letter goes out disposing of the case is now between 6 and 10 days, and it is expected that the time will soon be reduced substantially. Under the old act [*i.e.*, before the 1939 amendments] the

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[9] *Ibid; see, also*, S. Rep. No. 628, 74th Cong. 1st Sess. 2 (1935); Message of the President Recommending Legislation on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess. (1935).

Social Security Board Chairman Arthur Altmeyer reports that he urged adoption of the hearing provision in 1939 as "essential to protect the statutory right to benefits." A. Altmeyer, *The Formative Years of Social Security*, 102 (1966).

> average time was reduced to slightly less than two days.[10]

It was within this context of an agency handling cases with "efficiency and dispatch" that Congress added the right to a hearing in 1939.

As noted above, the Social Security Board clearly understood that a program designed to eliminate economic dependency required prompt hearings. In adopting provisions to establish the hearing system which the 1939 amendments required, the Board recognized the need for expedition among the "requirements . . . which must necessarily be met":

> Both from the standpoint of efficiency in handling so large a volume of cases, and by reason of human needs of the beneficiaries of the social insurance system, *expedition* in disposing of claims and of wage record cases *is of the essence of the task to be performed* . . . [I]t would often entail hardship for beneficiaries to be compelled to wait a period of months for the satisfaction of their claims . . . *Whatever hearing and review procedures adopted must be such as will not prevent*

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[10]Attorney General's Comm. on Administrative Procedure, *Administrative Procedure and Government Agencies*, S. Doc. No. 10, 97th Cong., 1st Sess. (Pt. 3) 13 (1941). The Attorney General's report included as an appendix the Social Security Board statement of policy for the implementation of the hearing requirement contained in the 1939 amendments. The statement exemplifies the high standards established by the early administrators of the Social Security Act. The need for the accurate processing of a large volume of cases was not seen as a reason to compromise the needs of claimants to receive prompt decisions on claims. Moreover, the procedures to be established were always designed to be respectful of the dignity of the claimants. *See, e.g., id.* at 36-38.

prompt action in the final disposition of claims.[11] The Board expressly stated its expectations for how promptly claims would be processed:

> The Bureau will not normally require more than 30 days in making its initial determination in relation to any claim after the claimant has assembled all essential proofs. It is expected that the Bureau's decision will be reexamined upon request within a specified time limit, say 30 days, being thoroughly reconsidered on the basis of further case development whenever there is anything to be gained by this process.

Id. at 40-41. Finally, in discussing the scheduling of hearings, the Social Security Board stated: "All hearings should be held within 30 days of the time requests are filed." *Id.* at 45.

Thus, the agency charged with implementation of the Act believed the timely provision of hearings to be "the essence of the task to be performed" under §205(b).[12] This "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery

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[11] *Id.* at 37 (emphasis added). The Secretary is correct in pointing out that the Social Security Board recognized important interests in fairness, uniformity, and accuracy of determinations. Br. at 20. But the Board did not see these interests as countervailing to the need for expeditious processing, noting, for example, that in "wage record proceedings, delay obviously would result in a well-nigh impossible accumulation of cases." *Administrative Procedure In Government Agencies, supra* at 37. In any case, in implementing the Act the Board clearly believed that expedition in the processing of claims was required.

[12] The Secretary notes that the Board did not list the timing of a hearing as a "Legal Consideration" in its statement. "Legal considerations" were seen as setting limits to the Social Security Board's freedom of choice in establishing and carrying forward its administrative methods. *Id.* at 36. Since the Board viewed expedition as one of those "requirements . . . , which necessarily must be met," *id.* at 36, it discussed it first, before its discussion of those "legal considerations" which had to be taken into account in satisfying the requirements such as expedition.

in motion, of making the parts work efficiently and smoothly while "they are yet untried and new" is entitled to "peculiar weight." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.), quoted with approval in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, ___ U.S. ___, 76 L. Ed. 2d 22, 51 U.S.L.W. 4547, 4552 (1983). Moreover, the Board's statement continued as the accepted policy of the agency after the disability insurance program was enacted and implemented. *See Administration of Social Security Disability Insurance Program: Hearings Before the Subcommittee on the Administration of the Social Security Laws of the Committee on Ways and Means*, 86th Cong., 1st Sess. 642 (1959).

Like the federal agency charged with administering Title II of the Social Security Act, this Court has interpreted the Social Security Act in light of Congress' remedial purpose in enacting the statute.[13] This Court has been willing to "assume a Congressional solicitude for fair procedure, absent explicit statutory language to the contrary" and has acted to ensure that the Secretary's procedures fairly implement the Act. *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979); *cf. Richardson v. Perales*, 402 U.S. 389, 400-01 (1971) (procedures must be "fundamentally fair").

The cases most analagous to the instant case in the concern about timeliness of agency action are those construing the requirement in Title III of the Social Security Act that unemployment compensation benefits be paid "when due." 42 U.S.C. §503. Most notably, in *Fusari v. Steinberg*, 419 U.S.379, 384, this Court was asked to rule on the lawfulness of Connecticut's procedures under which unemployment compensation benefits, terminated after an agency employee had interviewed the

[13] *See, e.g., United States v. Silk*, 331 U.S. 704, 712 (1947). This same approach has been consistently followed by the lower courts. As one court noted, "The books are replete with cases holding that the Social Security Act is a remedial statute to be broadly construed and liberally applied." *Haberman v. Finch*, 418 F.2d 664, 667 (2d Cir. 1969). *See also, e.g., Dousewicz v. Harris*, 646 F.2d 771 (2d Cir. 1981); *Davidson v. Gardner*, 370 F.2d 803, 807-808 (6th Cir. 1966).

recipient and determined that job search efforts were insufficient, were not resumed until the claimant prevailed at a hearing which was held an average of 126 days later. The Court did not find the termination itself a violation of the "when due" requirement, since the termination procedures afforded an informal opportunity to be heard as required by *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971). Instead, the Court, having concluded that "[t]he basic thrust of the statutory 'when due' requirement is timeliness," 419 U.S. at 387-388 (footnote omitted), found that the unreasonable delay in providing a hearing under all the circumstances of the case contravened the timeliness requirement implicit in the §503 requirement that benefits be paid "when due."[14]

Similarly, in *Java*, this Court was called upon to interpret the words "when due" in connection with a California practice of stopping payment when an employer raised a claim not initially considered. This Court noted that unemployment compensation benefits were designed to replace wages lost through no fault of the employee.[15] The Court then observed that Congress wished that eligibility be determined and payments be made as speedily as possible, and that the "when due" provision had to be construed in light of that underlying purpose. In sum, payment was to be made not whenever the agency reached a determination that payment was due, but at the first occasion for the agency to reach that determination.[16]

Given the language of the statute, the framework provided by this Court in its decisions, and the approach

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[14]The Court remanded the case for further proceedings in light of major changes in the Connecticut system at issue. *Id.* at 391.

[15]Thus the benefits at issue in *Java* were, in this regard, no different from the disability insurance benefits involved here.

[16]This Court has also not hesitated to find that Congress intended agencies to conduct administrative proceedings expeditiously when it has examined other statutory schemes. *See, e.g., Atlantic Refining Co. v. Pub. Serv. Comm'n. of N.Y.*, 360 U.S. 378, 390 (1959).

taken by other federal courts in interpreting the various provisions of the Social Security Act, it is not surprising that the courts below had little difficulty in concluding that the "reasonable notice and opportunity for a hearing" language in §205(b) requires that aggrieved individuals be afforded a hearing within a reasonable time.

The lower courts were also correct in extending their analysis to the reconsideration level. If the Act requires hearings within a reasonable time, it surely does not allow processes to be interposed[17] that themselves take unduly lengthy periods of time. Indeed, this Court included reconsideration delays in analyzing the length of time former recipients might have to wait to obtain a hearing. *See Mathews v. Eldridge*, 424 U.S. 319, 342 (1976). As the Secretary admits (Br. at 45), she has plenary authority to impose time limitations on state agency reconsideration determinations and perhaps to eliminate reconsiderations altogether. *See, also,* n. 24, *infra*. Surely she should not be able to shield herself from her statutory obligations because of her failure to exercise her authority.

Rather than challenge the lower court's interpretations that the Act requires that hearings be provided within a "reasonable" time, the Secretary appears to argue that the lower courts were incorrect in finding that the delays which confronted respondents violated their statutory right to a hearing within a reasonable time. Br. at 33. We now turn to that issue.[18]

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[17]The reconsideration level is a creation of the Secretary, not required by statute. However, in 1983 Congress required that the Secretary provide claimants who have been determined to be no longer disabled with an opportunity for a hearing as part of any reconsideration of their claim. Pub. L. 97-455, §2, 96 Stat. 2499. H.R. 3755, recently reported out of the Subcomm. on Social Security of the House Comm. on Ways and Means, would eliminate the reconsideration level.

[18]Since the courts below found for respondents on the Social Security Act claim, they did not reach respondents' Administrative Procedure Act (APA) or due process claims. Pet. App. A at 9a, n. 8, App. D at 15a, and App. F at 26a. Indeed, these claims are not presently before the Court, not having been

B. The Delays Encountered by Respondents, Being Unrelated to Proper Case Development Needs, Were Unreasonable as a Matter of Law.

The factual record developed in the district court established that the lengthy delays encountered by respondents were not related to the necessities of the disability

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presented as questions for review. Supreme Court Rules 34.1(a) and 21.1(a) and (f). Therefore, if this Court disagrees with the courts below that the Secretary violated the Social Security Act, a remand to consider respondents' other claims would then be in order. *Schweiker v. Gray Panthers*, 453 U.S. 34, 50, n. 23 (1981). *See Dandridge v. Williams*, 397 U.S. 471, 475, n.6 (1970). In light of the Secretary's having addressed these issues, Br. 39-44, we wish merely to note that the law is not so simple as the Secretary suggests. As to the APA, the Secretary is required under 5 U.S.C. §555(b) and (e) to conclude administrative appeals "within a reasonable time" and to give "prompt notice" of decisions. Moreover 5 U.S.C. §706(1) authorizes a reviewing court to "compel action unlawfully withheld or unreasonably delayed." Although the Second Circuit never reached the issue, the other courts of appeals which have considered Social Security delays have found that the APA is applicable. *Caswell v. Califano*, 583 F.2d 9, 15, n. 13 (1st Cir. 1978); *Blankenship v. Secretary of HEW*, 587 F.2d 329, 333 and n.5 (6th Cir. 1978); *Wright v. Califano*, 587 F.2d 345, 351 (7th Cir. 1978).

Contrary to the Secretary's assertions, the legislative history, the U.S. Dept. of Justice Attorney General's Manual on the Administrative Procedure Act (1946), and the case law demonstrate that the APA is applicable to this case. For example, the Senate Committee on the Judiciary Report stated that 5 U.S.C. §555(e) "affords the parties in any agency proceeding, whether or not formal or upon hearing, the right to *prompt action upon their requests, immediate* notice of such action, and a state of the actual grounds thereof." S. Rep. No. 752, 79th Cong., 2d Sess. 206, n.48 (emphasis supplied). *See, also, Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961). In discussing 5 U.S.C. §706(1), the Attorney General's Manual cites with approval *Safeway Stores, Inc. v. Brown*, 138 F.2d 278 (E.C.A. 1943), *cert. denied*, 320 U.S. 797 (1943), where the court held that a writ of mandamus could issue when an agency unreasonably delayed final action, even in the absence of an express statutory time limitation. Finally, neither this Court

evaluation process. In fact, nothing in the record justified the interminable delays and resultant hardships caused to innumerable disability claimants in Vermont. In the end, the specific facts of the case made it readily apparent that the Secretary's routine failure to satisfy the "need for expedition" in §205(b) could be eliminated in a manner that remained consistent with all statutory goals.

As this Court noted in *Fusari v. Steinberg*, 419 U.S. at 389, n.15, "'[a]ny statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility inevitably will generate fact-specific applications.'" There, statistics showing average appellate delays of 126 days and subsequent reversals in favor of 19.4% to 26.1% of the unemployment compensation claimants—reversal rates far less favorable to claimants than the 56% figures encountered in the instant case—were the key elements that led the Court to "determine on this record that Connecticut's previous system often failed to deliver benefits in a timely manner."[19]

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nor other courts have held that the APA is limited to situations where an agency refused to act or acted improvidently. *See Costle v. Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980); 3 K. Davis, *Administrative Law Treatise*, 5257 (2d ed. 1980).

The due process argument here is altogether different than the claim advanced in *Mathews v. Eldridge, supra*, and relied upon by the Secretary. Br. at 39. Respondents do not seek a pre-termination hearing. Rather, they contend that they are not being afforded an opportunity to be heard "at a meaningful time." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Therefore, the balance of interests is different than that performed by the Court in *Eldridge*, and depends upon how the facts in this case affect the balance of interests at stake. *See White v. Mathews*, 434 F. Supp. 1252, 1260-61 (D. Conn. 1976), *aff'd on statutory grounds* 559 F.2d 852 (1977).

[19] *Id.* at 383-84, 388. In its past term, the Court utilized a similar analytical framework in weighing the length of, the reasons for, and the injury engendered by delay in customs currency forfeiture proceedings to conclude that there was no violation of the due process clause. *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, U.S. , 76 L. Ed. 2d 143, 152, 51 U.S.L.W. 4587, 4589 (1983); *see also Barker v.*

Moreover, the results largely favorable to plaintiffs in Social Security delay cases from other jurisdictions have been grounded in similar factual development analyzing the nature of the steps in the administrative process, the length of delays, reversal rates, and the nature of injury to generally faultless claimants.[20] In short, the courts have uniformly rejected the notion that interpretation of §205(b) is exclusively left to Congress and the Secretary. (Br. at 36). *Cf. INS v. Chadha*, __ U.S. ___, 77 L. Ed. 2d 317, 346, 51 U.S.L.W. 4907, 4917, n.16 (1983) (agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded, it is open to judicial review as well as the power of Congress to modify or revoke the power entirely.")

Wingo, 407 U.S. 514, 530-31 (1972) (6th Amendment speedy trial analysis necessarily dependent on peculiar circumstances of case); *Deering Milliken, Inc. v. Johnston, supra*, 295 F.2d at 867-868 (whether delay violates APA reasonable dispatch requirement dependent on nature of proceedings, problems of agency, and interests of parties.)

[20]*See, e.g., White v. Mathews, supra*, 559 F. 2d at 858-59; *Caswell v. Califano, supra*, 583 F.2d at 12-13, 15; *Blankenship v. Sec'y of HEW, supra*, 587 F.2d at 334; *Barnett v. Califano, supra*, 580 F.2d at 30, 32; *Wright v. Califano, supra*, 587 F.2d at 353-54; *Crosby v. SSA*, 550 F. Supp. 1278, 1280-82 (D. Mass. 1982), *appeal pending*; *Williams v. Schweiker*, 541 F. Supp. 1360, 1363 (E.D. Mo. 1982), *appeal pending*. Even in *Wright*—where no violation of §205(b) was found—the Seventh Circuit applied a fact-specific analysis. However, the plaintiffs there failed to prove or even allege that "inexcusable circumstance" was a primary cause of delay. 587 F. 2d at 353, 354. Moreover *Wright* alone was a nondisability case and the named plaintiff sought only an increase in the retirement and survivors benefits exclusively at issue. *Id.* at 350, n.5, 355. In light of the "prospect for future progress in the reduction of processing times," and while leaving open the possibility of future intervention, the court declined to act. *Id.* at 354 and n.15, 356. Indeed, faced with a factual record containing a different equitable balance in *Smith v. Miller*, 665 F.2d 172, 176, 177 and n.5 (1981), the Seventh Circuit found no conceptual difficulty with the imposition of an "automatic approval" remedy to eliminate "unwarranted agency delay" encountered by Illinois Medicaid applicants.

In examining the claims of unreasonable delay in the instant case, the district court engaged in precisely the type of "fact-specific" analysis that Justice Powell articulated in *Fusari*. Indeed, the record developed below contains more comprehensive data than the reversal percentages and length of delay statistics that were enough to enable this Court to conclude that the requirement of expedition in Title III of the Social Security Act had been violated in *Fusari* and *Java*. Here, for example, the facts showed, *inter alia*, that:

- the Secretary had a regional hearing scheduling goal of 90 days with which she failed to comply in at least 43% of the Vermont cases. J.A. 50; Pet. App. D at 15a.

- while nothing in the prehearing case development process is inherently time consuming, plaintiff Day's experience showed delay to be caused by agency employee failure to adhere to the Secretary's own docketing procedures. J.A. 47-48, 57.

- the three ALJs hearing Vermont disability appeals equalled the Secretary's needs. J.A. 49.

- the ALJ reversal rate in favor of claimants exceeded 56%. J.A. 53.

- while both named plaintiffs ultimately prevailed in their appeals, each suffered substantial hardships through wrongful deprivation of benefits in the interim. J.A. 18, 21, 34, 150; Pet. App. D at 14a.

- while about 35% of the cases took well over 90 days to be "reconsidered" (and some exceeded one year), the agency explicitly recognized the need to shorten processing times in cases incomplete after 70 days. J.A. 91 (and Attachment A thereto contained in the record), 105-149, 167.

- the cause of delay in these cases was nearly universally linked to agency error as opposed to any necessary steps in the case development process, including lack of timely follow-ups and basic

inadherence to sound development practices. J.A. 105-149, 162, 168, 177.

- those few cases legitimately requiring relatively lengthy processing times (i.e., cases requiring additional medical development or those delayed by claimant causes) could be identified and distinguished from the majority of the cases. J.A. 52, 105-149.

In applying such facts to respondents' claims under §205(b), it is not surprising that the courts below found the primary remedial legislative goals to be severely compromised without countervailing benefit or justification. Contrary to the Secretary's assertions, the lower courts did not act "solely" based upon length of delay statistics (Br. at 11, 32), nor did they impose their "own notion" of proper processing upon the agency (Br. at 20), nor did they ignore statutory goals and "second-guess" Congress and the Secretary. (Br. at 36.) To use the Secretary's own words, the "element of timing implicit" in §205(b), *was* given content through fact-specific "reference to the overall statutory scheme and the benefits program established under that scheme." (Br. at 32.) In fact it is the agency's overemphasis upon administrative convenience that too "narrowly" and "somewhat myopically" (Br. at 34) repudiates the statutory requirement of expedition.

The logical extension of the Secretary's argument that review of her disability procedures is solely "a matter for Congress and the Secretary to resolve" (Br. at 36), would be to foreclose judicial review and relegate the district court's arduous fact-finding to an irrelevancy. The Secretary's primary argument in support of this radical position seems to be her perception that lengthy processing times are inevitably "an entrenched feature" despite

conscientious implementation of the Act.[21] The record severely undermines this position, however, for nothing inherent in the hearing development processes justifies the delays encountered by the Vermont disability claimants.

The complete absence of support in the record for the Secretary's position is most sharply focused by those few instances when she actually refers to the facts of the case.[22] For example, the Secretary attempts to undermine the significance of the 77 reconsideration case summaries that she herself supplied to inform the district court about the factual variations that may occur in the reconsideration process.[23] Yet to justify admittedly frequent delay, the Secretary can do nothing more than speculate

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[21] Br. at 33. There is no small irony in the Secretary's argument in this regard, for in *Mathews v. Eldridge*, 424 U.S. at 325, she distinguished disability determinations from those more complex factual "issues of credibility and veracity" involved in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Indeed, this Court agreed, finding disability determinations to be relatively "sharply focused and easily documented decisions[s] . . . [that] will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists,' *Richardson v. Perales*, 402 U.S. at 404." *Eldridge*, 424 U.S. at 343-44.

[22] The Secretary alludes to the Vermont record on which the lower court decisions largely turned at but two secondary portions of her argument. *See* Br. at 10-12 and 45, n.45. Furthermore, she entirely ignores the balanced accomodations made in response to her concerns in the district court's remedial order, which respondents discuss in depth at Parts IIA and III, *infra*.

[23] *See*, J.A. 105-49, 192-95; Pet. App. E at 26a and n.6, 28a. The Secretary filed the "77 individual randomly selected case summaries . . . in lieu of individual responses to plaintiffs' enumerated interrogatories." J.A. 105. The "enumerated interrogatories" are numbered 1-8 and 12-14 and appear between J.A. 151-57. As respondents show in their Statement of the Case, *supra* at 5, the summaries show that *every* case with a processing time exceeding 90 days contains examples of correctable agency error unrelated to claimant cause or resource problems.

that something significant and necessary to case processing must have "transpired *between* the particular milestones listed." Br. at 45, n.45 (emphasis in original). Unfortunately she failed to offer any enlightening information below to accompany her present speculation, or to refute the "sufficient factual insight" that the district court found in ruling the "unexplained" delays unreasonable. Pet. App. E at 26a.

The Secretary also ignores the reports of the Vermont DDA Administrator and her own program operations inspectors which found the primary causes of reconsideration delay to be grounded in "lack of timely follow-ups and basic inadherence to sound development practices."[24] Most significantly, the Secretary utterly fails to note that those nonroutine cases legitimately requiring more time to process are entirely excepted from the district court's order. Pet. App. E at 30a, App. F at 33a. Thus, for example, the order leaves the Secretary the time that is necessary to thoroughly and accurately develop and evaluate the medical data in individual cases.

Likewise, nothing in the record supports the Secretary's apparent concern that expedition is inconsistent with proper case development at the ALJ level of the hearing process. (Br. at 9, 37.) Indeed, her description of the hearing process, Br. at 6-10, is entirely devoid of any mention of the Vermont factual record that was determinative of the outcome of this case. Even in what she does say, the Secretary's emphasis is misplaced. In seeking to justify delay by stressing her compliance with the prehearing workup procedures in the *Office of Hearings*

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[24] J.A. 168, *see, also,* J.A. 162 and generally 161-91. The reports are discussed, *supra,* at 6. The conclusions of these persons are of particular importance since they are intimately familiar with day-to-day reconsideration activities. While the Secretary emphasizes that she does not directly control DDA activities, she concedes (as she must) that Congress has made her ultimately responsible for DDA "performance standards and procedures." Br. at 44; 42 U.S.C. 421. Indeed, she grades the state agencies based upon their ability to perform *initial* disability evalutions within a "minimum acceptable level of performance" of 49.5 days. 20 C.F.R. §404.1640 - 404.1642.

and Apeals Handbook, for example, she relegates the requirement of expedition in §205(b) of the Act to a secondary status. Br. at 8-10, 37. Yet no statute or regulation prohibits the scheduling of cases until "after the prehearing workup is completed."[25] Moreover, nothing in the record suggests that such workups cause undue delay. In fact, the first two months of ALJ-level delay in Leon Day's case resulted from the error of an SSA employee that entirely prevented the commencement of prehearing workup. J.A. 47-48, 57.

The facts in this case showed the Vermont caseload to be relatively small, while the three ALJ's there equalled the Secretary's needs. J.A. 46-7, 49. Certainly nothing in the record supports the Secretary's general concern that she might "be required to meet the applicable deadlines by reallocating resources from SSA regions that were not yet under a judicial decree."[26] Indeed, in January, 1979 the Secretary herself informed the district court of the 90 day hearing scheduling goal in effect for her operations in Vermont since January, 1978. J.A. 50. Significantly, however, this highly realistic goal was unmet in approximately 43% of the cases prior to the district court's

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[25] Br. at 37. To the extent the non-regulation *OHA Handbook* so limits scheduling, Br. at 8-10, it has no legal force and does not bind the agency. *Schweiker v. Hansen*, 450 U.S. 785 (1981). To the extent the *Handbook* prevents fulfillment of the need for expedition, it violates 42 U.S.C. §405(b). *See, also,* 20 C.F.R. §§404.941 ("a prehearing case review will not delay the scheduling of a hearing"), 404.944.

[26] Br. at 39, n.38. The absence of factual underpinnings to legitimize this as a concern material to the outcome of this case is emphasized by the fact that the Secretary can cite only alleged problems encountered in Massachusetts and New York to illustrate her point. *Id.*; Pet. at 16, n.17 and 17, n.21. The causes of such problems or even their existence were not part of the record developed below; speculation about such matters should not deflect this Court from proper review of the record of the instant case. *White v. Mass. Council of Constr. Employers*, U.S. , 75 L. Ed. 2d 1, 6-7, 51 U.S.L.W. 4211 (1983).

December, 1979 order—an order that led to near universal compliance with minimal administrative adjustment.[27]

Another key aspect of the factual analysis below was the Secretary's inability to refute the evidence concerning the hardship that almost inevitably falls upon disability claimants waiting for interminably delayed administrative action. Yet this consequence was a crucial element in the fact-specific balancing that led to the conclusion that the statute had been violated. Pet. App. A at 6a, App. D at 18a. The Secretary has it backwards when she accuses the lower courts of failing to explore all the legislative concerns within §205(b), for it is she herself who inappropriately minimizes the beneficent purposes of the statutory scheme and the requirement of expedition that helps achieve them.

In the *Java* and *Fusari* unemployment compensation cases, *supra*, an integral part of the analyses of this Court was the remedial purpose of the statute "to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java*, 402 U.S. 131-32; *see, also, Fusari*, 419 U.S. 387-88. As we have already demonstrated, the Title II disability benefits that by definition are paid only to those unable to engage in any substantial gainful activity," 42 U.S.C. §§416(i) and 423(d), are as designed to reduce claimant hardship as the unemployment compensation due under Title III. Moreover, this Court has specifically recognized the hardships endured by physically disabled workers who have fewer options than the average unemployed person.

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[27] Pet. App. D at 15a; App. at paras.1 and 2. Moreover, as we have shown and as will become further apparent in our discussion of the careful balances that the district court struck in fashioning its remedy, the 43% statistic was hardly the sole evidence considered by the district court as the Secretary claims. (Br. at 11.)

Mathews v. Eldridge, 424 U.S. at 341.[28] There, after drawing an analogy to the lengthy delays experienced by the unemployed workers denied but two weeks of benefits in *Fusari*, the Court acknowledged that the hardships resulting from delay "may be significant" notwithstanding "potential sources of temporary income" sometimes available to the families of disabled workers with income below the subsistence level. *Id.* at 341-43.

Certainly the potential availability of food stamps and Vermont welfare benefits did little to forestall the hardships encountered by plaintiffs Day and Maurais, J.A. 18, 21, 34, or other members of their class, J.A. 103.[29] As has already been noted in their Statement of the Case, *supra*, lengthy delay led to extreme difficulties for both Mr. Day and Mr. Maurais, including accumulation of large debts, forced moves, and inability to pay for basic

[28] Of course the *Eldridge* Court went on to reject the non-statutory due process challenge to the absence of pretermination hearings in Title II disability cases, a result that, if anything, increases the need for the expeditious adjudication of appeals. Although *Eldridge* found less potential deprivation for disabled workers than for the welfare recipients in *Goldberg v. Kelly, supra*, the Court also conceded that "the degree of difference can be overstated." 424 U.S. at 341.

[29] *See, also,* Judge Holden's opinion in *Chagnon v. Schweiker*, 560 F. Supp. 71, 74 (D. Vt. 1982), a case challenging the Secretary's failure to expeditiously implement favorable decisions in Title II and XVI disability cases over roughly the same time span covered in the instant case. There, eleven affidavits documented "the obvious fact that claimants forced to undergo lengthy delays before receiving payment often suffer severe hardships . . . [notwithstanding the availability of] relatively meager Vermont General Assistance payments, food stamps, and the generosity of friends and neighbors."

Furthermore, eligibility for both food stamps and Vermont welfare benefits is premised upon complex categorical and financial eligibility rules that would hardly provide coverage for all class members. Indeed, Vermont General Assistance is limited primarily to a biweekly cash payment of $21.00 coupled with a maximum housing payment to the landlord of $124.00 per month when the rent is 30 days overdue. Vt. Dept. of Social Welfare, WELFARE ASSISTANCE MANUAL §§2611, 2613.1 (1983).

fuel, medical, automotive, or shelter expenses. The court of appeals noted that such circumstances constituted "irreparable harm", especially when considered in the context of the large escalating reversal rate in appealed disability cases. Pet. App. A at 6a - 7a.[30]

As if recognizing the absence in the record of any justification for the delays and hardships respondents endured, the Secretary relies to a considerable degree upon the allegation that new developments justify the delays that were encountered in Vermont. Thus, she complains of escalating appellate requests and speculates that the disability amendments of 1980 and 1982 (*sic*) "may have the effect of increasing processing times."[31] But even were there any merit to these conjectures, the Secretary raises them in the wrong forum. The district court acted based upon the factual record and the law before it. The

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[30] Interminable administrative agency appellate delays inherently raise the danger of "accompanying irreparable injury to the parties." *FPC v. Hunt*, 376 U.S. 515, 527 (1964); *see, also, NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1969). In the disability cases, the harm caused by delay borders on the intolerable. *Blankenship*, 587 F.2d at 334; *Caswell*, 583 F.2d at 18 and n.15. As early as 1977 the Second Circuit observed that by definition "[t]he disability insurance program is designed to alleviate the immediate and often severe hardships that result from a wage-earner's disability." *White*, 559 F.2d at 858. In *Barnett v. Califano*, 580 F.2d at 32, the agency itself drew the Court's attention to a report citing the "great damage" and "high psychic costs" resulting from disability delays.

[31] Br. at 35. However, the Secretary's concern that the requirement of periodic review of continuing disability investigation (CDI) cases might increase delays is repudiated in large part by her own acknowledgement of the 1982 congressional relaxation of this requirement to afford her maximum flexibility, Br. at 6, n.7, discussing the effect of Pub. L. No. 97-455, §3, 96 Stat. 2499 (1983). This is a primary illustration of the fact that Congress has not hesitated to amend the Act to help alleviate the hearing backlog problem or even to retreat on earlier initiatives that have had a contrary unintended effect. Indeed, the Secretary states that one result of the amendments enacted in 1980 and 1983 will be to "actually expedite completion of the *overall* process." Br. at 35 (emphasis in original).

law remains unchanged. If new factual developments have truly altered the equitable balance upon which the order below was based, the Secretary's proper response would be a motion in the district court to modify the relief earlier granted. *See* Fed. R. Civ. P. 60(b); *New York State Association for Retarded Children v. Carey*, 706 F.2d 956,967 (2d Cir. 1983) (Friendly, J.). Thus far the Secretary has chosen not so to move, and neither has she shown that continuation of the district court's remedy would be inequitable.[32]

In the end, the facts proved that lengthy processing times were not as "entrenched" as the Secretary represents. (Br. at 33). As the courts below discovered, delay beyond 90 days was unwarranted in Vermont where the record documented the failure of the agency to follow its own procedures, to properly review or obtain necessary evidence, to mitigate internal systems breakdowns, or to comply with a professed 90 day goal that was easily achievable. Yet the district court remained fully sensitive to the agency's occasional need for unusually lengthy processing times. As we next discuss, *infra*, the remedial order imposed was entirely responsive to the Secretary's concerns.

II. THE TIME LIMITS ORDERED BY THE DISTRICT COURT ARE A BALANCED AND APPROPRIATE REMEDY THAT CURES THE VIOLATIONS OF RESPONDENTS' RIGHTS WITHOUT OVERBURDENING THE PROCESSES OF THE SECRETARY.

A. The Time Limits Allow for the Timely and Accurate Processing of Disability Cases.

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[32] The district court specifically crafted its remedy to enable SSA to "retain some flexibility to implement additional statutory review and notice requirements in the future." Pet. App. E at 29a. Note also that while the court issued its preliminary injunction enjoining unreasonable hearing delays in excess of 90 days in 1980, the Secretary was able to comply, apparently without adverse impact elsewhere, in every case but one through the first quarter of 1983. *See*, J.A. 101-04; App. at paras. 1 and 2.

After concluding that §205(b) provides disability claimants with the right to administrative appellate action within a reasonable time and after finding in the Vermont record no justification for delays exceeding 90 days, the district court held the Secretary to be in violation of the statute and turned to the task of devising a meaningful remedy. In choosing an objective standard by which to measure the reasonableness of delays faced by respondents, the court utilized the Secretary's own 90 day benchmark.[33] However, Judge Holden was unwilling, wisely as it turned out, to await implementation by the Secretary of a 90 day limit via a proposed rule.[34] Instead the court implemented a time limitation remedy in Vermont that was grounded in the Secretary's own attainable objectives.

In requiring reconsiderations to be processed within 90 days and hearings to be scheduled within a like time frame, Pet. App. F at paragraphs 2 and 4, the court never lost sight of the Secretary's needs. As the Second Circuit noted in its review of Judge Holden's order, "... the relief ordered was crafted with an eye towards the Secretary's concerns." Pet. App. A at 8a. That the district court took these concerns into account becomes obvious upon considering the following limits to the scope of the time limitation relief:

> - for reconsiderations, all cases are excluded in which new medical developments have occurred subsequent to the initial determination or the

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[33] As we have noted, the Secretary has had a 90 day hearing scheduling goal in effect in Vermont since January, 1978. J.A. 50. Moreover, as is discussed in more detail *infra* at 37-38, the district court was well aware of SSA's 1975 representation to Congress that a 90 day deadline would be in effect nationwide by 1977. Pet. App. D at 18a. Indeed, at a relatively early stage of this litigation the Secretary proposed a 90 day hearing time limit in published regulatory form. 45 Fed. Reg. 12837 *et seq.* (Feb. 20, 1980).

[34] Pet. App. D at 18a - 19a; *see, also,* n.38 and accompanying text, n.43, *infra.*

claimant undergoes a consultative medical examination suggested by the Secretary. Pet. App. E at 30a, App. F. at paragraph 2.

- for hearings, the order requires only *scheduling* within 90 days, allowing ALJs sufficient post-hearing time to arrange for additional evidentiary reports, if necessary, and to prepare an accurate decision. Pet. App. D at 19a, App. F at paragraph 4.

- for both stages of the process, all cases are excluded where claimant initiated delay is involved in any way, Pet. App. F, paragraphs 2, 4, 7.[35]

As the Second Circuit observed, these aspects of the district court's remedy insure "the only meaningful way to encourage prompt adjudication," while still leaving the agency al. the time necessary "to garner the fresh information required to assure accurate results." Pet. App. at 8a. Thus the order is entirely consistent with the recent observation of the House Ways and Means Committee that "the time needed before a well-reasoned and sound disability hearing decision can be made may vary widely on a case-by-case basis." H.R. Rep. No. 97-588, 97th Cong., 2d Sess. 19 (1982). The balance and flexibility in the time limit remedy enables the agency to "give 'adequate consideration to both speed and quality of adjudication.' "[36]

The Secretary was able to comply with the district court order by making but a few minor procedural adjustments. Thus, local staff may now have to flag

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[35] To assure compliance with the time limits, the district court also included an interim payment device in favor of wronged claimants. This aspect of the order, as well, was balanced in response to each of the Secretary's concerns. *See* Part III, *infra*.

[36] Br. at 30, n.36, quoting Staff Report of the Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Status of the Disability Insurance Program* (Comm. Print 1981).

folders, fill out "Day Court Order Control Sheets," or communicate lists of cases violating the order (if any) to other components of the agency, J.A. 196-201. These tasks do not represent onerous administrative burdens. Since the district court left the Secretary free to devise procedures consistent with its order, the courts below can hardly be accused of engrafting their own notion of proper procedures upon the Secretary.[37]

Unfortunately, the Secretary repeatedly overstates the extent of the relief imposed below. Certainly no aspect of the district court's remedy requires that an opportunity for a hearing is automatically unreasonable if delayed beyond 90 days (Br. at 32), nor that a 90 day time frame must be attained on a nationwide basis (Br. at 38). The district court merely engaged in a basic judicial function of weighing the facts presented in interpreting a federal statute and ordering relief in favor of the wronged party.

In fact, respondents fully agree with the Secretary that §205(b) does not contain "fixed deadlines for holding hearings for benefits under Title II" (Br. at 19). However, neither has Congress ever intended that its primary legislative goal of expedition should be rendered nugatory by unnecessarily lengthy delays or that courts be barred from achieving that goal by utilizing an objective standard developed in light of the facts of a particular case. Indeed, the Secretary herself has repeatedly recognized that time limits represent an appropriate solution to the problem of unreasonable delay.

For example, within two months of the district court's initial decision finding unreasonable hearing delays in Vermont, Pet. App. D, the Secretary published proposed regulations requiring hearings to be scheduled within 90

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[37] Thus, the Secretary's reliance on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (Br. at 31) is misplaced. Nothing in the district court's remedy can be construed to impose significant additional procedural requirements upon her agency. The order induces compliance with "statutory minima" by insuring that the Secretary fulfills the need for expedition that is "mandated by statute." *Id.* at 548, 558; *see, also, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, U.S. ,77 L. Ed. 2d 443, 462, 51 U.S.L.W. 4953, 4958 (1983).

days. 45 Fed. Reg. 12837 *et seq.* (Feb. 20, 1980). After public comment, final regulations were drafted substituting decisional time limits of 165 days. In the preamble to the final regulations at 5, SSA states its belief "that *uniform time periods* for issuing hearing decisions, and reviewing decisions *will increase the efficiency of the administrative appeals process.*" (emphasis added).[38] The agency also expressed its approval of the recommendation of the Administrative Conference of the United States that each agency adopt time limits to insure prompt disposition of adjudicatory actions. Thus, the Secretary has espoused the belief of the Administrative Conference that timetables or deadlines are "useful tools for reducing delays and are preferable to more rigid statutory time limits." *Id.* at 4.

Indeed, on August 15, 1983, the Secretary again affirmed the propriety of time limits in proposing regulations to implement the new statutory requirement (Pub. L. No. 97-455, §4, 96 Stat. 2499-50 (Jan. 12, 1983)) that evidentiary hearings be provided to claimants who request reconsideration of disability cessation determinations. The statute, like §205(b), does not contain express time limits. Nonetheless, the proposed regulations include a 60 day decisional "time limitation as an assurance to beneficiaries that this stage of the appeals process will be

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[38] Copies of the preamble and the final rule were attached as Exh. A to Def't's Opposition to Pltfs' Motion for Order Compelling Discovery and Motion to Direct Entry of Final Judgment, filed with the district court on October 22, 1980. Another copy has been lodged with the Clerk of the Court. The Secretary's rule-making effort was based in part, at least, on the 1978 remand order in *Blankenship v. Sec'y. of HEW*, 587 F.2d 329, 336, where the Sixth Circuit provided the Secretary "an opportunity to develop a nationwide rule." The Secretary opted for rule-making after declining to petition this Court for a writ of certiorari (though she had obtained two extensions of time in which to do so). After the time limit rules were modified and finalized by the Secretary, she obtained approval from the district court for promulgation via publication in the Federal Register. *See, Blankenship v. Sec'y. of HHS*, 517 F. Supp. 77, 81 and 532 F. Supp. 618, 620-21 (W.D. Ky. 1981 and 1982) *appeal pending; see also*, n. 43 *infra*.

completed promptly, *as we believe Congress intended*." 48 Fed. Reg. 36836 (1983) (emphasis added); *see, also,* n. 24, *supra*, and the regulations referred to there.

Despite her frequent recognition that time limits represent an appropriate mechanism to expedite unnecessarily delayed agency action, the Secretary has failed to exercise her authority to promulgate time limit regulations as part of an administrative solution that would alleviate the unreasonable delays the district court found in Vermont. This failure seems to be rooted in her erroneous underlying assumption that timely administrative appeals are inconsistent with "accurate, uniform, and just determinations." (Br. at 34.) In fact, reasonably expeditious appellate action is not a "countervailing interest" that will shift emphasis away from other equally important statutory goals. (*Id.* at 34, 36.) Rather all the goals within §205(b)—especially accuracy and timeliness—are integrally related, and the district court's balanced remedy shows that it treated them as such.[39]

B. The Time Limits are Entirely Consistent with the Social Security Act.

Perhaps the major conceptual error in the Secretary's argument is her apparent inability to distinguish fixed nationwide time limits that Congress does not include in §205(b) from the balanced and limited district court remedy. Thus she never addresses the central issue of the case—whether the district court abused its discretion in utilizing objective standards to determine whether the Social Security Act was violated via unreasonable delay.

The proper standard for appellate review of a federal district court's exercise of its equitable discretion, unless Congress has foreclosed such exercise entirely, is whether

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[39] Thus, *e.g.*, the flexibility given the Secretary to take all the time required to complete posthearing case development dispels her concern that the order will induce ALJs "to deny benefit claims because insufficient evidence had been obtained within the time allowed to support a finding of disability." (Br. at 38.) Moreover, the reversal rates exceeding 56% that confronted the district court were hardly an indication of either accurate, uniform, or just determinations.

the district court abused its discretion. *Weinberger v. Romero-Barcello*, 456 U.S. 305, 320 (1982). As Justice White made clear in that case, in the absence of a statutory bar district courts retain complete equitable discretion "to order relief that will achieve *compliance* with the [relevant] Act."[40] Moreover,

> [t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.
> *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)

Yet while Congress may surely intervene to guide or control equitable discretion, this Court will "not lightly assume that Congress has intended to depart from established principles" that leave courts in equity to the exercise of their sound discretion. *Weinberger v. Romero-Barcelo* at 313; *see, also, Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 290-92 (1960); *Hutto v. Finney*, 437 U.S. 678, 687-88 (1978); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (equitable jurisdiction is comprehensive in scope and "not to be denied or limited in the absence of a clear and valid legislative command . . . in so many words or by a necessary and inescapable inference.")

In the absence of a clear statutory command barring equitable jurisdiction to remedy violations of §205(b), the Secretary points to several irrelevant sections of the

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[40] *Id.* at 318 (emphasis in original). *Cf. Bush v. Lucas*, ___U.S.___, 76 L. Ed. 2d 648, 654, 51 U.S.L.W. 4752 (1983) (federal courts have power to grant relief not expressly authorized by statute, which is to be exercised in light of relevant congressional policy determinations); *Califano v. Yamasaki, supra*, 442 U.S. at 705 (1979) (absent the clearest command to the contrary from Congress, federal courts have equitable power to issue injunctions requiring the Secretary to comply with Title II of the Social Security Act.)

Social Security Act, apparently seeking by "necessary and inescapable inference" to find congressional disapproval of the district court's approach. But it is difficult to see how legislation passed by Congress well over a generation after the enactment of an unchanged §205(b) and not referring in any way to the question of judicial relief discloses anything about the intent of the earlier Congress. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.30 (1977). Indeed, an examination of the statutes mentioned by the Secretary reveals no limitation upon the power of a United States district court to require the timely hearings mandated by §205(b).

The Secretary first refers to 42 U.S.C. §1383(c)(2), which requires hearing decisions within 90 days of hearing requests made by nondisability claimants seeking Supplemental Security Income (SSI) benefits under Title XVI of the Act. But even assuming this section has any relevance for respondents, all of whom are claimants for disability insurance benefits under the Title II program, it does not alter the propriety of the lower court actions herein.[41] In the absence of a specified limit within §205(b), the lower courts properly looked at all aspects of the situation in Vermont to determine whether or not the delays encountered there were unreasonable under that statute. Indeed, the existence of a 90 day deadline in the SSI program for nondisability cases is some indication of

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[41] Nor is the Secretary aided by her citations to *United States v. Erika, Inc.* 456 U.S. 201 (1982) and *Lehman v. Nakshian*, 453 U.S. 156 (1981). In both cases the precisely drawn statutes and unambiguous legislative histories contrast sharply with the inconclusive language of §205(b) and the consistent legislative history favoring expeditious hearings from 1939 to the present. Moreover, SSI statutory distinctions hardly represent clear legislative commands from which inescapable inferences about the Title II program can be drawn.

the time frame within which Congress expected the processing of disability appeals.[42]

The Secretary also points to the Title II expedited payment provision, 42, U.S.C. §405(q), apparently attempting to show that a disability claimant's "countervailing interest in a speedy disposition weighs less heavily" than those of nondisability claimants. (Br. at 22.) Yet four years after the enactment of §405(q), Congress authorized expedited payments to disability claimants in the SSI program. 42 U.S.C. §1383(a)(4)(B). The legislative history of §1383(a)(4)(B), which allows for the payment of up to three months of SSI benefits, indicates that Congress fully expects the Secretary to process disability claims expeditiously. The Senate Report stated:

> In order to avoid any interruption in benefits to an eligible disabled person, the committee expects that the Secretary will make the initial determination of disability before the end of the three month

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[42] *See, e.g., Barnett v. Califano*, 580 F. 2d at 31. Contrary to the Secretary's presumption, there is no indication in the legislative history as to why the 90 day time limit applied only to nondisability cases. What the legislative history does show is that one of the "main elements of the legislation creating the SSI program, was to provide an efficient, modern, national administrative mechanism . . . avoiding the unproductive red tape and delay that so many of our most needy citizens have encountered in the past to obtain help." 117 Cong. Rec. 21090 (1971) (remarks of Chairman Mills).

At the time Congress enacted Title XVI, the Secretary's regulations applicable to the predecessor Aid to Aged, Blind or Disabled program required administering state agencies to take "final administrative action" with respect to hearing requests within *60* days from the date of the request. 45 C.F.R. §205.10(a)(11) (1972). Surely Congress did not substitute federal administration to lengthen the delays faced by disabled persons awaiting a hearing decision. Indeed, it is ironic that while the Secretary complains to this Court about the undesirability of time limits, she continues to require Puerto Rico, Guam and the Virgin Islands—all of which still have Aid to the Aged, Blind and Disabled programs—to render hearing *decisions* within *90* days of request. 45 C.F.R. §205.10(a)(16) (1982).

period. S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 391 (1972).

Furthermore, Congress has been aware that the courts have uniformly interpreted §205(b) to require hearings within a reasonable time and have most frequently ordered time limit remedies. *See* Staff of Senate Comm. on Finance, 96th Cong., 1st Sess., Issues related to the Social Security Disability Program 51 (Comm. Print 1979); *Social Security Appeals and Case Review Process: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 14, 23 (1981). Yet Congress has never legislated a change in any pertinent part of the statute. Congressional inaction as easily represents approval of the approach below as the converse. *Girouard v. United States*, 328 U.S. 61, 68 (1946). Indeed, the operative language that is the source of the entire remedy imposed below was re-enacted without change with the amendment of §205(b) that occurred on January 12, 1983. P.L. No. 97-455, §4, 96 Stat. 2499. This creates a strong presumption of an implicit adoption of that remedy with the passage of the Disability Amendments of 1983. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Merrill Lynch, Pierce, Fenner and Smith v. Curran*, 456 U.S. 353, 381-82, and at 403 n.11 (Powell, J., dissenting) (1982).

The legislative history of the Disability Amendments of 1983 reveals a continuing belief that each "disability claimant is entitled to a timely hearing." Br. at 29 quoting H.R. Rep. No. 97-588 at 19. However, contrary to the Secretary's assertions, no legislation passed by Congress regarding the payment and processing of benefits under the Social Security Act does anything to prohibit the remedial relief afforded the Vermont claimants below.

C. The Time Limits are Appropriate in Light of Congressional Oversight Activity.

The Secretary also argues that ongoing congressional oversight of Social Security Administration problems bars judicial remedial approaches. But the extensive concern of Congress with the broad problem of hearing

delays hardly precludes judicial involvement that eliminates at least a limited aspect of that problem. Most fundamentally, the Secretary never explains how the oversight functions of Congress in any way negate a duly enacted statute. *Cf. INS v. Chadha, supra.* Moreover, the Secretary seems to lose sight of the fact that it is the Executive Branch, not Congress, which is to "take care that the laws be faithfully executed." U.S. Const. Art. II, §3, cl. 4.

A look at the congressional oversight of the hearing delay problem reveals that legislative activity has been primarily influenced by repeated agency assurances that administrative steps would reduce the backlog of hearing requests and otherwise resolve the problem. As far back as 1975, in response to congressional skepticism about the agency's goal to hold hearings promptly, the Commissioner of Social Security stated that he expected all hearing decisions to be *made* within 90 days of the request of hearing. The Commissioner further reassured Congress that he viewed this goal as "realistic". *Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 74 (1975), quoted in *White v. Mathews*, 559 F.2d at 860, n.10. Indeed, Congress relied upon these representations when it passed legislation providing the additional resources that the Commissioner stated would be necessary to reduce the troubling delays. S. Rep. No. 94-550, 94th Cong., 1st Sess. 3 (1975).

Yet both the problem and legislative concern about it persisted. In 1980 SSA was directed to recommend to Congress "the maximum period of time" within which Title II hearings would be decided. Pub. L. No. 96-265, §308, 94 Stat. 458. As the Secretary mentions (Pr. at 27-28), she submitted a report to Congress providing nationwide maximum *decisional* time limits of 150 days for reconsiderations and 165 days for hearings. However, she fails to point out that these time limits were appended to her report in the form of final regulations "to be promulgated in connection with the *Blankenship* case." Dep't. of HHS, Rep. on the Implementation of §308, Pub. L. No. 96-265, Time Limitations for Decisions on Title II Benefit Claims (1980). Indeed, the regulations and report submitted to Congress were accompanied by a letter in

which the agency stated that it was "specifying the time limits which we believe are realistic, which we plan to achieve, and for which we expect to be held accountable." Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., App. C at 45 (Comm. Print 97-3 1981). Such assurances were hardly calculated to prompt Congress to believe that the unacceptable hearing delay problem was not close to an administrative resolution. Neither, of course, did they signal the need for legislative action.[43]

In late 1981 the Associate Commissioner for Hearings and Appeals told Congress that:

> If OHA [Office of Hearings and Appeals] is successful in obtaining the additional resources it requires, and if productivity improves in line with my expectations, by the end of Fiscal Year 1983 our pending caseload will drop to the point where processing delays due to backlog are minimal.[44]

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[43] The failure of Congress to take additional actions must be viewed against the backdrop of the Secretary's decision to remedy the delay problem by the promulgation of these time limit regulations. As we noted at n.38, *supra*, the *Blankenship* district court approved the Secretary's own final time limit regulations for publication. On November 30, 1981, however, the Secretary advised the court that it would not promulgate the regulations after all. *Blankenship v. Sec'y of HHS*, 532 F. Supp. at 73. Even at this point, Congress could have expected further administrative actions to address the problem, for the agency announced that it would instead promulgate processing goals. *Ibid.* But no such goals have been forthcoming, a development the Secretary erroneously seems to blame on the *Blankenship* district court. (Br. at 28, n.34).

[44] *Social Security Appeals and Case Review Process: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 18 (1981). The Commissioner of Social Security later referred to this reassuring testimony when asked by the House Appropriations subcommittee whether he had brought the "serious problem with processing hearings and appeals" to the attention of the Ways and Means Committee. *Dep'ts. of Labor, HHS, Education, and Related Agencies Appropriations for 1983: Hearings Before a Subcomm. on the House Comm. on Appropriations*, 97th Cong., 2d Sess. 635 (1982).

No resources were withheld. In fact, Congress has never used its power of the purse to block the Secretary from obtaining sufficient resources to deal with delays in the administrative process. To the contrary, Congress has appropriated virtually all sums sought by the Secretary to administer Title II of the Social Security Act. *Dep'ts. of Labor, HHS, Education, and Related Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 1st Sess. 867 (1983) (hereinafter, *1984 Appropriations*). Moreover, Congress has on several occasions expressed its willingness to provide the Secretary with additional resources to meet her statutory obligations, "including the maintenance of an adequate staff so that reasonable case-processing times exist at all levels of adjudication." House Comm. on Ways and Means, Report on the Disability Amendments of 1982, H.R. Rep. No. 97-588, 97th Cong., 2d Sess. 20 (1982); *see, also, Disability Investigation Program: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 2d Sess., Serial 97-90, at 15-16 (remarks of Chairman Pickle).

Nonetheless, the agency continues to advise Congress that its appropriations request "is something that will be adequate and will allow us to make significant improvements in the overall process." *1984 Appropriations, supra*, at 583; *see, also, id.* at 528, 659, 873, 891. While Congress may have had "full knowledge of the disability caseload" (Br. at 32), it has also received repeated assurances of imminent administrative resolution of the problem of hearing delays. In fact in her most recent annual report, the Secretary again stated that despite increasing workload, internal improvements would enable her "not only to handle current hearing requests but also to start reducing the pending caseload." Dep't. of HHS, Social Security Administration, Ann. Rep. to the Congress 9 (1983).

In sum, Congress has been well assured by SSA that significant progress will be made in resolving the hearing delay crisis, and well aware that several courts have addressed the problem by imposing time limit standards.

Yet Congress has not taken any action explicitly or implicitly addressing either objective time limits under §205(b), or the nature of such judicial relief.[45] Accordingly, the objective time limits imposed by the district court have not been barred nor even frowned upon by Congress.

III. PROSPECTIVE INTERIM PAYMENTS REPRESENT A LEGITIMATE EXERCISE OF A COURT'S POWER TO INSURE THAT ITS ORDER IS OBEYED AND TO PROVIDE SOME RELIEF TO WRONGED DISABILITY CLAIMANTS.

The goal of the respondents in this action has been to obtain reasonably expeditious action upon their disability appeals. J.A . 24-25. In imposing flexible time limit relief to bring about compliance with §205(b), however, the district court recognized that its remedy would have little meaning to the very persons it is designed to protect in the absence of compliance by the agency. In its concern with implementing a solution that "most appropriately balances the administrative difficulties in implementing this order and the financial needs of deserving claimants," Pet. App. E at 31a, the court decided in its discretion that an interim payment device was necessary to insure that the Secretary processed appeals without unreasonable delay.[46]

[45] Indeed, proposed legislation relating to the interim payment remedies used to enforce some court's time limits failed to pass Congress. *See, infra*, at n.50.

[46] The interim payment device is designed exclusively to fulfill the need for expedition in §205(b). Any compensation to a disability claimant that may on occasion be required by this enforcement mechanism is best described only as an "interim payment" not a "disability insurance benefit." In its discretion, the district court could as easily have chosen the sum of $100 per month, or $500, or utilized any other alternative approach to secure compliance. *See, e.g., Rodriquez v. Swank*, 496 F.2d 1110, 1113 (7th Cir. 1974), *cert. denied*, 419 U.S. 885 (1974). A fully recoupable sum equivalent to the amount of benefits otherwise due, however, represented a reasonable accomodation, easy to administer.

To achieve a proper balance, the court provided that its enforcement mechanism would be:

—prospective only;

—fully recoupable;

—initiated only after future violations of both §205(b) and the time limits designed to prevent *unnecessary* delay;

—inapplicable or terminable in the event of delay caused by the claimant or necessary developmental steps in the process;

—initiated, in the event of reconsideration delay (if ever), only after the passage of a 180 day time period which is twice the 90 day limit that the court concluded to be the far edge of reasonableness in the typical case.

Pet. App. E at 30a - 31a and App. F at paragraphs 6 and 7.

As we have already noted in Part II A, the district court also balanced its time limitation device with numerous appropriate exceptions. Given the substantial documented harm suffered by disabled persons experiencing lengthy delay, *see supra* at 3-4, 26-27, additional limitations built into the interim payment mechanism show that the court was extremely solicitous of the Secretary's needs and concerns. For example, the Secretary has 90 days to render reconsideration determinations in routine cases not involving new medical development or claimant activity that slows processing, Pet. App. F at paragraph 2; but even upon failing to comply with this requirement, she would not have to make payment unless an additional 90 days passes without a decision. *Id.* at paragraph 6. Thus, the court's remedy requires disability claimants at the initial phase of a four-layered appellate process to bear the full cost of delay for a six month period. In light of the court's findings that the delays were virtually never caused by claimants and that hearing reversal rates exceed 56%, the

interim payment device can hardly be said to be balanced against the Secretary.

In constructing the relief at issue here, the district court exercised its traditional discretionary power to assure a cessation of violations of federal law. *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (there is "a duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.") Furthermore, "the historic injunctive process was designed to deter, not to punish," *Hecht Co. v. Bowles*, 321 U.S. at 329. Of course, monetary payments contingent upon noncompliance with an injunction represent a traditional means of enforcement by deterrence.[47] Without impacting on the rights of claimants elsewhere and with but one documented instance of a need to make an actual payment, App. at paragraphs 1 and 2, the enforcement mechanism has had its intended effect of compelling the compliance with §205(b) in Vermont that previously was achievable yet unachieved. The "consequence of the injunction" confirms the propriety of the remedial approach. *Califano v. Yamaski*, 442 U.S. at 697; *see, also, id.* at 705.

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[47] *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *Hutto v. Finney, supra*, 437 U.S. at 690 ("Many of the court's most effective enforcement mechanisms involve financial penalties.") The Secretary has earlier suggested that monetary payments against her must "rest on the court's exercise of its contempt power." Reply Memo for the Pet'r at 5, n.2 (Apr. 1983). But she does not suggest what would be gained by repetitive contempt proceedings. Indeed, numerous courts have anticipated and alleviated problems of noncompliance with injunctions by including financial incentives that prevent the need to reenter the courtroom for ministerial contempt determinations. *See, e.g., Smith v. Miller, supra*, 665 F.2d at 175, 177; *Rodriquez v. Swank, supra*; Alexander v. Hill, 707 F.2d 780, 783 (4th Cir. 1983), *petition for cert. pending sub nom. Syria v. Alexander*, No. 83-163; *White v. Mathews, supra; Barnett v. Califano, supra; Blankenship v. Sec'y of HHS, supra; Crosby v. SSA, supra; Williams v. Schweiker*, 562 F. Supp. 149 (E.D. Mo. 1983).

In addition to assuring protection of respondents' statutory rights by inducing timely hearings, interim monetary payments are a particularly appropriate device because they do not involve the district court in the supervision of day-to-day operations of the agency. Rather they leave it to the Secretary to determine how to run her agency in a way that complies with her statutory mandate. Indeed, at least since the *White* and *Barnett* decisions, *supra*, she has had procedures in place to administer the interim payment device whenever necessary.

In spite of the balance and effectiveness that the device lends to the district court's remedy, the Secretary contends that the court has no authority under Title II to impose such an enforcement mechanism because such payments are barred by specific provisions of the Act itself. Her argument is based entirely upon her characterization of interim payments as disability insurance benefits, however, and is therefore misplaced. By ignoring the fact that the interim payment device is merely a mechanism designed to achieve compliance with a court order, the Secretary's reliance on various sections of the statute treats each out of context.

Thus, 42, U.S.C. 405(i) simply provides the procedure for certification and payment from the Social Security Trust Funds after a proper finding of eligibility under 42 U.S.C. §423(a)(1) and contains no substantive restrictions on the equitable power of a trial court to assure compliance with both §205(b) and other aspects of its remedy.[48] The same is true of 42 U.S.C. 405(q) which

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[48] Neither court below required that any interim payment should come from the Trust Funds. Certainly, the limiting factors in the district court's order will safeguard against the possibility of adverse impact.

On the other hand, the lengthy deprivation of Title II disability benefits frequently imposes a drain on the public treasury elsewhere. In *Mathews v. Eldridge*, 424 U.S. at 324, n. 27, this Court recognized that the absence of such benefits may be partially offset by state and local welfare benefits or food

presumes a prior finding of substantive eligibility and primarily exists to provide a procedure for the replacement of lost or erroneously unpaid old age and survivor's benefits. Moreover, nothing in the January 12, 1983 Social Security Act amendment temporarily authorizing continuing disability benefits to those who appeal disability cessation determinations is inconsistent with the remedial order below.[49] A "special concern" of Congress to provide protection to those persons situated similarly to a small part of the Vermont class here can hardly be construed as a legislative rejection of the balanced relief granted below.[50]

As the Secretary indicates, the legislative history of the Disability Amendments of 1983 reveals a continuing belief that each "disability claimant is entitled to a timely hearing." Br. at 29 quoting H.R.. Rep. No. 97-588 at 19. While reaffirming the "need for expedition", Congress *expanded* protections for claimants in response to an avalanche of horror stories.[51] In arguing that Congress delib-

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stamps. More intangible societal costs engendered by unreasonable delay, of course, are incalculable. Moreover, in the welfare context this Court has noted that development of prompt and skillful procedures will reduce "much of the drain on fiscal and administrative resources." *Goldberg v. Kelly*, 397 U.S. at 266.

[49] *See*, Pub. L. No. 97-455, §2, 96 Stat. 2498, adding 42 U.S.C. §423(g), discussed in the Sec'y's Br. at 4 and 49. About 8% of the respondent class consists of beneficiaries appealing cessation determinations.

[50] *See Merrill Lynch, Pierce, Fenner and Smith v. Curran, supra*, 456 U.S. at 384 and 394 and n.100. The Secretary's contrary citation to H.R. Rep. No. 97-588 (Br. at 49, n.47) is seriously misleading. That report was not prepared in conjunction with the legislation that was enacted on Jan. 12, 1983. Instead it was a report for a 1982 bill that would have amended §205 to prohibit interim payments in the absence of a final determination of benefit eligibility. *See* H.R. 6181, H.R. Rep. No. 97-588, 97th Cong., 2d Sess. §11(d) (1982). Most significantly and unfortunately for the Secretary's argument here, the bill failed to pass either house.

[51] *See, e.g.*, 128 Cong. Rec. H 9658-60 (daily ed. Dec. 14, 1982) (remarks of Reps. Conte and Hammerschmidt).

erately intended to undercut similar relief that was crafted in light of a unique factual record in favor of Vermont claimants who were denied the protections of the Act, the Secretary seriously misconstrues both the purpose of the 1983 amendments and the beneficial purpose underlying the statute. *See Bob Jones University v. United States*, U.S. , 76 L. Ed. 2d 157, 170, 51 U.S.L.W. 4593 (1983).

The Secretary also argues that even if there is not a specific bar, the absence of express congressional authorization for interim payments requires a holding that the district court's enforcement mechanism is barred by sovereign immunity principles. Br. at 46-47. She ignores however, the basic dichotomy, for purposes of sovereign immunity, between retroactive awards and prospective payment orders. This Court has emphatically stated that:

> *a federal court's remedial power*, consistent with the Eleventh Amendment, *is necessarily limited to prospective injunctive relief*, Ex parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury.[52]

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[52] *Edelman v. Jordan*, 415 U.S. 651, 676 (1974) (emphasis added). Principles underlying state immunity under the Eleventh Amendment derive from the same principles governing the federal government's sovereign immunity. *Id.* at 660 and n.9; *Fla. Dept. of State v. Treasure Salvors*, ___U.S.___, 73 L. Ed. 2d 1057, 1070 n.21, 50 U.S.L.W. 5056 (1982); *Monaco v. Miss.*, 292 U.S. 313, 321-27 (1934); Field "The Eleventh Amendment and Other Sovereign Immunity Doctrines," 126 *U. Pa. L. Rev.* 515, 517 (1978); Jaffe, "Suits Against Governments and Officers: Sovereign Immunity", 77 *Harv. L. Rev.* 1, 21 (1963).

Fiscal consequences that are necessitated by compliance with prospective decrees represent but an ancillary effect that is both permissible and often inevitable.[53]

Thus, the cases relied upon by the Secretary do not apply. Both *United States v. Testan*, 424 U.S. 392 (1976) and *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728 (1982) involved attempts by former federal employees to acquire retroactive back pay. This Court viewed such claims as damages actions to which the government had never consented. On the other hand, judicial relief that would have had an ancillary effect of prospective wage reinstatement was clearly distinguished as allowable. *Testan*, 424 U.S. at 401 n.5 and 403. More recently in *United States v. Mitchell*, U.S. , 77 L. Ed. 2d 580, 51 U.S.L.W. 4999, 5005 (1983), this Court again affirmed that prospective equitable remedies against federal officials are fully justified.

Finally, the Secretary's reliance upon *Schweiker v. Hansen*, 450 U.S. 785 (1981), lends no support to her argument either. The only issue there was whether a claimant could retroactively be determined eligible for statutory benefits under an estoppel theory notwithstanding her failure to comply with the application requirement of the Act. In sharp contrast, the question here is whether a court may devise a prospective order that eliminates the Secretary's own noncompliance with the Act by insuring that timely hearings are provided. Likewise, compliance with the court order that both the record below and subsequent developments have proven to be easily within the Secretary's capacity will prevent any needless charge on the public treasury, in the form of either interim payments or the state and federal public assistance benefits that the disabled often receive in their stead.[54]

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[53] *Id.* at 667-68; *see, also, Ex parte Young*, 209 U.S. 123 (1908); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971); *Goldberg v. Kelly, supra; Quern v. Jordan;* 440 U.S. 332, 337 (1979).

[54] The citation to *INS v. Miranda*, (Br. at 48), another estoppel case, is inapposite as well. There is both a statutory requirement of reasonably prompt processing and ample evidence of unwarranted delay in the instant case, unlike the absence of such in *Miranda*, ___U.S.___, 74 L. Ed. 2d 12, 16 (1982).

In the end, the Secretary points to no authority that undermines the unique effectiveness of the interim payment mechanism. The devise is fully consistent with the exercise of discretionary remedial powers by a trial court and it provides a perfect "fit" between the wrong and the remedy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,
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September 26, 1983

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APPENDIX

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration
Region 1
John F. Kennedy Federal Bldg.
Government Center
Boston, MA 02203

March 29, 1983

Mr. Richard H. Munzing
Staff Attorney
Vermont Legal Aid, Inc.
Bank Block, Main Street
Springfield, VT 05156

Dear Mr. Munzing:

I have received your recent correspondence concerning our Manchester, New Hampshire, Hearing Office that services all of Vermont as well as New Hampshire.

In response to your specific questions, I am listing the following information in the same sequence as shown in your letter:

1. Only two cases have required the payment of interim benefits under the Day and Barnett Court Orders; one in January 1983, and the other in August 1982, respectively.

2. No cases have been transferred to other hearing offices from Manchester due to the Barnett or Day Court Orders. An Administrative Law Judge was transferred to Manchester due to growing workloads.

3. The fourth ALJ was added to the Manchester staff in June of 1980 due to increasing receipts.

4. The placement of ALJs is done by our Central Office in Arlington, Virginia, based on workload needs.

There is no ceiling on the number of ALJs. There is a staffing ceiling on support staff. The Manchester Office is now at its support staff ceiling so that no hiring is being done at this time.

5. There is no quota regarding the number of monthly dispositions established for ALJs in this region. However, the average disposition per ALJ for the Manchester Office is 32.3 per month. Total clearances for Manchester in 1982 was 1,554 cases.

6. The ratio of support staff to ALJ in Manchester is 4.1 to 1. There is no official "goal" established by OHA against which this ratio can be evaluated.

7. Our office is not involved in the reconsideration process which is handled by the Social Security District Offices and the State Agencies. Information on reconsiderations would have to be obtained through the Regional Commissioner of Social Security Robert C. Green, Room 1100, John F. Kennedy Federal Bulding, Boston, MA 02203.

If we can be of any further assistance, please feel free to contact us at any time.

Sincerely yours,

David K. Ronka
Regional Management Officer
Office of Hearings and Appeals